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SUPREME COURT OF APPEALS OF VIRGINIA.

WRIGHT v. WRIGHT.

June 12, 1919.

[99 S. E. 515.]

1. **Insane Persons (§ 87*)—Insanity as Bar to Divorce.**—The insanity of defendant is no bar to the prosecution of a suit for divorce for a cause which accrued before such insanity began.

[Ed. Note.—For other cases, see 4 Va. W. Va. Enc. Dig. 743.]

2. **Divorce (§ 37 (5*))—Desertion—Intervening Insanity.**—Where the husband became insane within three months after the desertion, the insanity is a bar to the wife's suit; for, since the husband became incapable of forming an intent, and continued desertion depends on continued intention, the time during which he was insane could not be included in computing the statutory period.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 738, et seq.]

Appeal from Circuit Court, Louisa County.

Suit for divorce by Minnie A. D. Wright against Robert W. Wright. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Gordon & Gordon, of Louisa, for appellant.

W. C. Bibb, of Louisa, for appellee.

PRENTIS, J. The complainant, Mrs. Robert W. Wright (Minnie A. Denton Wright), appeals from a final decree sustaining a demurrer to her bill for divorce, filed against her husband, Robert W. Wright, which alleges as the ground therefor that he willfully deserted her on January 27, 1914, and that such desertion has continued for more than three years. The bill also alleges that on May 26, 1914, her said husband was adjudged a lunatic, and was thereupon confined in the Western State Hospital; that he had been permitted since then to come to Louisa county on a furlough, and while there seemed perfectly natural and sane, though he is still confined as a lunatic. The court appointed a guardian ad litem for the defendant, who filed a general demurrer to the bill, and for cause of demurrer relied upon the insanity of the defendant, occurring within less than three years from the date of the alleged desertion.

[1, 2] While it may be regarded as settled by the great weight of authority that the insanity of the defendant is no bar

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

to the prosecution of a suit for divorce for a cause which accrued before such insanity began, yet the precise question presented by this record appears to have arisen in very few cases. If the desertion had continued for three years before the insanity of the defendant intervened, then the cause of action would have been complete, and the insanity would have been no defense. This was determined in *Fisher v. Fisher*, 54 W. Va. 146, 46 S. E. 118, 1 Ann. Cas. 251. Here, however, within three months after the alleged desertion, the defendant became insane. While the cases have been few, the prevailing view is that in such a case the insanity of the defendant is a bar to the suit.

Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. Rep. 708, presents a question precisely similar to the one here raised. The Nebraska statute there construed provided that a divorce may be granted "where either party willfully abandons the other without just cause for a period of two years." The Virginia statute (Code, § 2257) provides that a divorce from the bonds of matrimony may be decreed to the party abandoned "where either party willfully deserts or abandons the other for three years." In that case this is said:

"It is a universal rule that, where one spouse abandons or deserts the other and returns to the unoffending party before the expiration of the statutory period, a ground of divorce does not arise, or accrue. Our statute has fixed the period of two years, and the offending party could return at any time prior to the expiration of two years, and thus prevent a cause of action accruing to the other party. Separation, no matter how long continued, unless there was an intent not to return, or, in other words, an intent to abandon, would not constitute a ground for divorce. On the other hand, no matter how willful the desertion may be, nor how destitute of reasonable cause, there is no ground for divorce, unless it is continued for a period of two years."

Under the Virginia statute, at any time during the three years succeeding the abandonment the offending party has the undoubted right to return to the other, and if that right is exercised there is no ground for divorce. For three years, in Virginia, such offender may repent and return. The ground for an absolute divorce does not accrue from the mere abandonment. It must be willfully continued for the period fixed by the statute, and the cause of action does not accrue until that time has elapsed. Of course, an insane person is incapable of forming the intent, either to continue the desertion or to seek a reconciliation. It follows logically that in this case the cause

of action has not accrued, and that the decree of the trial court sustaining the demurrer is without error.

In *Blandy v. Blandy*, 20 App. D. C. 535, this is said:

"For the continued desertion must depend upon the continued intention, and, as has been well said, but for the insanity of the wife she may have repented and returned to her husband before the expiration of the statutory period."

In *Storrs v. Storrs*, 68 N. H. 118, 34 Atl. 672, it is held that the time during which the defendant was insane could not be included in computing the statutory period. The authorities are collected in 9 R. C. L. 357, 129 Am. St. Rep. 708, 138 Am. St. Rep. 160, and 34 L. R. A. 161.

So that, while in some cases there may be undue hardship, we can not amplify the grounds of divorce fixed by the statute, or adjudge an insane person to be capable of determining whether to seek a reconciliation or to persist in the willful intent to abandon for the period prescribed by the statute. If there be hardship, the question is one of public policy, for the consideration of the General Assembly.

Affirmed.

BURKS, J., absent.

Note.

Contrary Holding.—In *Douglas v. Douglas*, 31 Iowa 421, it was held that a husband who willfully deserts his wife while sane, and remains away for the statutory period required to warrant a divorce in her favor, cannot excuse himself on the ground that before the expiration of the statutory period he became insane.

In this case it appeared that the husband and wife had lived together happily for many years, when the defendant husband became insane. He was confined in an asylum for some time and discharged as cured; whereupon he returned to his relatives, but refused to live with his wife. A few months later, there was a judicial examination as to his condition, and he was pronounced sane, and then settled with his guardian, who was discharged. During the judicial examination the defendant asserted that he never intended to live with plaintiff again, but gave no reason, and refused to do so when asked. In a short time he was again sent to an asylum. During his second confinement in the asylum he corresponded with his friends, but refused to write to his wife, although she urged him to answer her letters. The wife brought suit for divorce and it was held that the evidence satisfactorily established the fact that the defendant willfully deserted his wife without a reasonable cause, and that he absented himself for two years. The court said: "How much soever we may sympathize with the defendant in his misfortune and would be ready to commend the self-sacrifice and devotion that would lead the plaintiff to cling closer to him, even though his affection, like his reason, may be permanently clouded, yet the statute is the measure of the plaintiff's rights, and it is our duty to enforce it."